

Emperor Vs. Ganesh Damodar

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Court : Mumbai

Decided On : Feb-15-1907

Reported in : (1907)9BOMLR353

Judge : Chandavarkar and ;Pratt, JJ.

Appeal No. : Criminal Application for Revision No. 26 of 1907

Appellant : Emperor

Respondent : Ganesh Damodar

Judgement :

Chandavarkar, J.

1. We agree with the learned Sessions Judge that Section 544 of the Code of Criminal Procedure and Rule No. XI made by the Government of Bombay under that section regulating the payment, on the part of Government, of the expenses of complainants and witnesses in cases coming before the criminal Courts, invest the Magistrate trying a warrant case with a discretionary power exerciseable by him within the limits specified in the rule itself. The question, then, is whether in the present case, the offences charged against the accused being admitted to be bailable, ' the prosecution has been instituted or is being carried on by, or under the orders of, or with the sanction of Government, or of any Judge, Magistrate, or other public officer.' There is no material before us on which we should be justified

in holding that the prosecution has been instituted or carried on by, or under the orders of, or with the sanction of Government. But Mr. Khare, appearing for the accused, argues that it is a prosecution instituted by a public officer, because the complainant here is the Police Inspector. But the record shows that the police are acting merely in exercise of the authority vested in them as to cognizable offences. A Police Constable reported the alleged offence to the Police Inspector. The accused were arrested by the Police and then placed before the Magistrate. Upon these facts it cannot be said that the prosecution falls within the terms of the rule above quoted, especially having regard to the Note, appended to the rule, which runs as follows:-

Note-In cases in which the offence is bailable and cognizable, it does not follow because the Police have sent up the case to the Magistrate, that therefore the prosecution has been instituted or is being carried on by or under the orders of or with the sanction of Government or of any Judge, Magistrate or other public officer.' Page 9 of the High Court Criminal Circulars.

2. The question, however, remains whether though the prosecution was not instituted by or under the orders of Government or of any Judge, Magistrate or other public officers, it is after institution, being 'carried on ' by or under the orders of any of them. Mr. Khare for the accused having urged that a special pleader of this Court has been employed to conduct the prosecution, the learned Government Pleader has informed the Court that after the institution of the prosecution the Legal Remembrancer wired to him to send a special Counsel who would, on arrival at Nasik, take instructions from the District Magistrate and that a pleader has accordingly been appearing in the case and Conducting the prosecution. We think that this circumstance brings the case within the words 'carried on ' which are wide enough to cover it. We, therefore, hold that the Magistrate had discretion to order payment of bhatta in this case.

3. Though the power of the Magistrate who tries the case is discretionary, such discretion must be exercised according to sound judicial principles and reasonably. The ground on which the Magistrate has refused to exercise the discretion in favour of the accused is that the accused are not in indigent

circumstances. The last sentence of Sub-clause 2 of Clause 1 of Rule No. XI, on which the Magistrate apparently relies is construed by him to apply to accused persons. Assuming the Magistrate is right in his construction, the condition as to indigence, to whomsoever it applies is, according to Rule No. XI, an alternative to the condition (b) on which the accused rely. And if the case of the accused falls within (b) in Sub-clause (2) of 1 of the rule, the accused are entitled to have their case considered under that sub-clause. The Magistrate having exercised his discretion substantially under an erroneous view of the rule, we can set aside his order on the ground that he has misconstrued the rule giving him the discretion. As to the merits of the case we are satisfied that they are in favour of the accused. The offences are alleged to have been committed at Nasik. The trial commenced at Nasik. But the Magistrate, having had to remove his office to Malegaon on account of the exigencies of official business unconnected with the case, the trial has been going on there. For this the accused should not be held responsible or made to suffer. We, therefore, set aside the order and make the rule absolute.

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